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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 293

EDWARD LAUF and AMALGAMATED MEAT CUTTERS and BUTCHER WORKMEN OF NORTH AMERICA, Local No. 73,
Petitioners

-vs.-

E. G. SHINNER & COMPANY, INC.,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

MORRIS FROMKIN,
Counsel for Petitioners.

HAMMERSMITH-SORTHEVER CO. MILWAUKEE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. ——

EDWARD LAUF and AMALGAMATED MEAT CUTTERS and BUTCHER WORKMEN OF NORTH AMERICA, Local No. 73,
Petitioners

-vs.-

E. G. SHINNER & COMPANY, INC.,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

Edward Lauf and Amalgamated Meat Cutters and Butcher Workmen of North America, Local No. 73, the petitioners above named, respectfully pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit

affirming a judgment of the District Court of the United States for the Eastern District of Wisconsin. Judgment was rendered in the Circuit Court of Appeals, May 13, 1937 (P. 4, supplement to the record). Their number 6172.

The appeal was from a final judgment of the District Court awarding a permanent injunction to respondent restraining petitioners from picketing or in any manner persuading the public not to patronize respondent's places of business (R. 11).

SUMMARY STATEMENT OF MATTERS INVOLVED

Petitioners are respectively the business agent and a labor union composed of butcher workmen and meat cutters in the City of Milwaukee, which union is affiliated with the American Federation of Labor. Respondent is a Delaware corporation operating meat markets in various cities, including several markets in Milwaukee.

Petitioner Local 73 picketed five stores of respondent in Milwaukee for the purpose of inducing respondent to sign what is known as a "Preferential Contract," which requires the employer to give preference to union workmen in choosing employees.

Respondent filed its bill of complaint in the District Court (Record (5551) 1 to 5) asking for temporary and permanent injunction. After the taking of oral testimony upon the application for the temporary injunction, the court made findings of fact and conclusions of law (Record (5551) 38, 39) and awarded a temporary injunction restraining all picketing and all advertising of

the fact that respondent was unfair to organized labor (Record (5551) 43, 44).

An appeal was taken from the order awarding the temporary injunction and, after hearing on the appeal in the Circuit Court of Appeals, the order awarding the temporary injunction was affirmed (Lauf v. Shinner, 82 Fed. (2) 69).

The case was then tried in the District Court, a small amount of additional testimony was taken and it was stipulated that all the testimony taken upon the hearing for the temporary injunction be considered as testimony upon the trial. The District Court made findings of fact and conclusions of law practically identical with the findings of fact and conclusions of law which it had made upon the hearing for temporary injunction (Record (6172) 6 and 7). And awarded a permanent injunction practically identical in terms with the temporary injunction (Record (6172) 10 and 11). Judgment was entered awarding the injunction as prayed for. An appeal from this judgment was taken, and it was stipulated and the Circuit Court of Appeals ordered that the record of the previous appeal (5551) be considered as part of the record upon the second appeal. Upon the second appeal, judgment was rendered affirming the judgment of the District Court.

QUESTIONS PRESENTED

The case squarely presents the question as to whether a Federal Court has the right under the terms of the Norris-LaGuardia Act (Secs. 101 to 115, Title 29, U.S.C. 47 Stats. 73) to enjoin picketing and peaceful persuasion by a labor union and its members where the

employees of the employer who is being picketed are not members of such labor union, and are not on strike.

The case presents the same question under the terms of the Wisconsin Labor Code (Wis. Stats. 1935, Secs. 103.51 to 103.63). The Wisconsin Labor Code is practically identical with the Norris-LaGuardia Act.

The question involved in the determination of the foregoing question is whether a situation such as exists in the present case, that is, where the employees of the employer being picketed are not members of the labor union doing the picketing, and are not on strike, constitutes a labor dispute within the meaning of the Norris-LaGuardia Act and the Wisconsin Labor Code.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

1. The United States Circuit Court of Appeals for the Seventh Circuit has decided a federal question in a way in conflict with applicable decisions of this court.

Senn v. Tile Layers Protective Union, Local No. 5, 300 U. S. ——— 81 L. Ed. 829, 57 (16) S.C.R. 857.

National Labor Relations Act Cases, 300 U. S. ———, 81 L. Ed. 563, 585, 603, 108 A.L.R. 1352.

2. The United States Circuit Court of Appeals for the Seventh Circuit has decided a question of substance in a way which is in conflict with the decision of another Circuit Court of Appeals upon the same question.

Levering & Garrigues Co. et al, v. Paul L. Morrin et al, 71 Fed. (2d) 284 (Certiorari denied, 293 U. S. 595).

3. The United States Circuit Court of Appeals for the Seventh Circuit has decided an important question of local law in a way in conflict with applicable local decisions.

American Furniture Co. v. I. B. of T. C. & H. of A., 222 Wis. 338, 268 N. W. 250.

Senn v. Tile Layers Protective Union, Local No. 5, 222 Wis. 383, 268 N. W. 270.

4. The United States Circuit Court of Appeals for the Seventh Circuit has decided an important question of general law in a way untenable and in conflict with the weight of authority.

Steffes v. Motion Picture Operators' Union, 136 Minn. 200, 161 N. W. 524.

Kirmse v. Adler, 311 Pa. 78, 166 Atl. 566.

Cinderella Theater Co. v. Sign Writers' Local Union (D.C. Mich.), 6 F. Supp. 164.

Exchange Bakery & Restaurant Co. v. Rifkin, 157 N. E. 130.

National Protective Association of Steam Fitters & Helpers v. Cummings et al., 170 N. J. 315, 63 N. E. 369.

Bayonne Textile Corp. v. Amer. Fed. of Silk Workers et al., 116 N. J. Eq. 146, 176 A. 551.

Nann v. Raimist etc., 255 N. Y. 307, 174 N. E. 690.

Wise Shoe Co., Inc., v. Retail Shoe Salesmen's Union, 266 N. Y. 264, 194 N. E. 749.

Curran v. Galen (N. Y.), 46 N. E. 297.

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American Steel Foundries v. Tri-City Central Trades Council, 257 U. S. 184.

Norris-LaGuardia Act, (Secs. 101 to 115, Title 29, U.S.C. 47 Stats. 73).

Wisconsin Labor Code (Wis. Stats. 1935, Secs. 103.51 to 103.63).

Wherefore, it is respectfully prayed that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding that court to certify and send to this Court for its review and determination the full and complete transcript of the record and all proceedings in the case at bar, their number 5551 and 6172, and that the judgment of said United States Circuit Court of Appeals for the Seventh Circuit may be reversed by this Honorable Court or the case ordered dismissed and that your petitioners may have such other and further relief in the premises as this Honorable Court may deem just and proper and your petitioners will ever pray.

EDWARD LAUF and AMALGAMATED MEAT CUTTERS and BUTCHER WORKMEN of NORTH AMERICA, Local 73,

Petitioners.

MORRIS FROMKIN,

Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

OPINION BELOW

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit, which has not yet been published, will be found as page 4 of the Supplement to the Record.

The opinion recites that the appeal is from a decree permanently enjoining petitioners from picketing respondent's places of business * * * * and from advertising that respondent is unfair to organized labor or molesting or persuading its customers, or prospective customers to cease patronizing them. The court refers to its opinion on the previous appeal from the decree awarding a temporary injunction (Lauf v. Shinner & Co. 82 F. (2d) 68) and states that it was shown upon the previous appeal that no controversy existed between respondent and its employees, none of whom belonged to petitioners' union, and that said unions sought to compel petitioners to require its employees to join the union as a condition of their continued employment. The court states, that upon these facts it held upon the previous appeal that no labor dispute was present, and hence the Norris-LaGuardia Act was no bar to the right of the court to issue the injunction. For these reasons the court affirmed its position set forth in the opinion on the previous appeal.

In its opinion on the previous appeal, that is, from the temporary injunction, (82 Fed. (2) 69), the Circuit Court of Appeals starts with the premise that no strike or dispute between employer and employee is involved in the case. It reviews the sections of the Norris-LaGuardia Act, (29 U.S.C 101, 115), especially Sec. 104

which abolishes the jurisdiction of the Federal Courts to enjoin, among other things, "(e) giving publicity to the existence of, or the facts involved in any labor dispute, whether by advertising, speaking, patrolling or any other method not involving fraud or violence; (f) assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute; (i) advising, urging or otherwise causing or inducing, without fraud or violence the acts heretofore specified."

The court further sets forth Sec. 107, Title 29, U.S.C., the provision of the Norris-LaGuardia Act which abolishes the jurisdiction of Federal Courts to issue temporary or permanent injunctions in cases involving or growing out of labor disputes, except after findings of fact by the court—

> "(a) That unlawful acts have been threatened and will be committed unless restrained, or have been committed and will be continued unless restrained.
>
> (b) That substantial and irreparable injury to complainant's property will follow.
>
> (c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief.
>
> (e) That the public officers charged with the duty to protect complainant's property, are unable or unwilling to furnish adequate protection."

The court then recites Sec. 113, Title 29, U.S.C., which is as follows:

> "(a) A case shall be held to involve or grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein;

or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or association of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees and associations of employees; or when the case involves any conflicting or competing interests in a 'labor dispute' * * * of 'persons participating or interested' therein * * *

"(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft or occupation.

"(c) The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee * * *"

The court further states, that the provisions of the Wisconsin Labor Code are not materially different from the provisions of the Norris-LaGuardia Act.

The court concludes that both the Norris-LaGuardia Act and the Wisconsin Labor Code are applicable only

to cases involving or growing out of a labor dispute, and that the present case is not such a case, because the controversy is merely between two unions, and because none of respondent's employees was a member of Local 73, the petitioner; that, therefore, neither employer nor any of his employees is engaged in a labor dispute with anyone, and that the object of the picketing and persuasion used by the petitioner, Local 73, was an unlawful one, that is, of coercing respondent to force his employees to join the petitioner union. Hence, the court concludes, there is no labor dispute involved within the meaning of the Norris-LaGuardia Act, or the Wisconsin Labor Code, and for this reason sustains the judgment of the District Court, although that court made no findings of the facts required to be made by the court under Sec. 107, Title 29, U.S.C.

The District Court had made findings of fact and conclusions of law which set forth merely that the petitioner union had made demand upon respondent that it require its employees to become members of petitioner union; that respondent had notified its employees that they were free to join petitioner union, and that said employees had declined to join, and that petitioner union was not the union chosen by any of said employees to represent them. Further, that for the purpose of coercing respondent to require its employees to join the union, and accept it as their bargaining agent, and for the purpose of injuring respondent's business, petitioner union had conspired to cause false and misleading signs and banners to be placed before respondent's meat markets, and had caused persons, none of whom were employees of respondent, to picket before the markets, and had falsely accused respondent of being unfair to organized labor, and had prevented patrons from patronizing said markets by moles-

tation, annoyance, threats and intimidation. The court found further that irreparable injury to respondent would result because of this conduct, and that there is no labor dispute between petitioners and respondent.

Upon the basis of these findings, the court concludes that under the terms of the Norris-LaGuardia Act, 29 U.S.C. Sec. 102 and the Wisconsin Labor Code, respondent is bound to permit its employees free agency in the choice of a labor organization, and for this reason the court awards the injunction (R. 38, (5551), R. 6, (6172)).

Upon the basis of these findings, the District Court refused to make the findings required under Sec. 107, Title 29, U. S. C., and refused to go into the question as to whether any basis existed for making the finding required by that section, that is, it was the theory of the court that since there was no labor dispute, it was immaterial as to whether unlawful acts had been threatened, or would be committed unless restrained, as provided by Subsection (a), Sec. 107, Title 29, U.S.C. or that as to each item of relief greater injury would be inflicted upon complainant by the denial of relief, than would be inflicted upon defendants by granting same, as provided by Subsection (c) Sec. 107, or that public officers charged with the protection of complainant's property were unable or unwilling to furnish adequate protection as provided by Subsection (e) of Section 107.

There was no facts in the evidence which would have justified the court in finding the matters required by these subsections. The issue was therefore clear as to whether the case presented a labor dispute within the scope of the Norris-LaGuardia Act.

ERRORS TO BE ASSIGNED

1. The Circuit Court of Appeals Erred in Holding There Was No Labor Dispute Under the Federal Law and the Law of Wisconsin.

ARGUMENT

I.

This Case Involved a Labor Dispute Within the Terms of the Norris-LaGuardia Act, Secs. 101 to 115, Title 29, U.S.C. 47 Stats. 70, 73.

The Norris-LaGuardia Act provides, Sec. 104, Title 29, U.S.C.

> "No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute *(as these terms are hereinafter defined)* from doing whether singly or in concert, any of the following acts,"

and enumerates amongst other things, (e) Giving publicity to the existence of, or the facts involved in any labor dispute, whether by advertising, speaking or patrolling; (f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute; (g) Advising or notifying any person of an intention to do any of the acts specified.

It is apparent that the jurisdiction to issue injunctions or restraining orders in labor controversies was abolished by this section. It is definitely stated, that no court of the United States shall have jurisdiction to issue any restraining order or injunction in any case involving or growing out of a labor dispute.

Sec. 113, Title 29, U.S.C. clearly and definitely defines the terms used throughout the act. Subsection (c) provides:

> "The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee."

It is clear that the act is not one merely altering or governing procedural matters, but was definitely intended as a limitation upon the jurisdiction of the federal courts. The language could not be interpreted to mean anything else. It means that wherever a labor dispute exists the jurisdiction of the federal courts to issue injunction is taken away, except upon the enumerated conditions.

If no definition were given in the act, two possible interpretations of the words "labor dispute," would be open to the court; one, that it included only controversies between an employer and his employees; two, controversies between employers and any employees, whether his or not.

Petitioners contend that under the terms of the definition in Sec. 113, it is impossible to mistake the intent of Congress, and that such intent is so clearly expressed that there is no room for judicial construction. That intent definitely and clearly adopted the second definition above. Thus, a labor dispute includes any controversy concerning terms or conditions of employment. It is not limited in this regard to a controversy between an employer and his specific employees. It further includes any controversy concerning the association or representation of persons in negotiating, etc., terms or conditions of employ-

ment. Again there is no restriction that the controversy concerning association, etc., must be limited to a particular employer and his employees, but in order to prevent all possible doubt, and to make it excessively clear that it was not intended that the act be restricted to controversies between an employer and his own employees, Congress added the words "regardless of whether or not the disputants stand in the proximate relation of employer and employee." These words absolutely and definitely exclude definition No. 1 above as a possible intent in the minds of the legislative body. From these words, it is definitely clear that Congress intended the act to apply to any controversy between employers and employees, whether the employees were employees of the employer with whom they had a dispute or not. It would seem to be clear that it was the intent of Congress to cover by the act any controversy between workingmen and employers concerning the conditions of employment, or the association or representation for the fixing of terms. It is for the court, if it is convinced, that such is the intent of Congress to give it this effect.

The only limitation beyond the definition in Subsection (c) upon a labor dispute as used in the act, is Subsection (a) of Sec. 113.

> "A case shall be held to involve or grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3)

between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a 'labor dispute' (as hereinafter defined) of 'persons participating or interested' therein (as hereinafter defined)."

This section not only does not give any basis for the narrow definition of the words "labor dispute," but helps to make it clear beyond doubt that Congress intended the act to cover a controversy such as is involved in this case. Firstly, a case is a labor dispute when it involves persons engaged in the same industry, that is, if butchers have a dispute with employers of butchers, that is a labor dispute. The subsection goes farther and makes the controversy a labor dispute not only when the controversy is between those in the same industry, but when it is between those who have direct or indirect interests in such industry. This would seem to clearly show the intent to extend the terms even beyond those in the same industry to other workingmen who have the same objective as the workingmen who are having a dispute with an employer. This goes much farther than is necessary to hold that the present case involves a labor dispute. And the section provides further that a controversy is a labor dispute when it is between those who are members of the same or an affiliated organization of employers or employees. This would clearly seem to mean that a dispute of any union of the American Federation of Labor, which is affiliated with all the other unions of that federation, is a labor dispute notwithstanding that such controversy is not between a union and an employer in the same craft or industry. That is, a labor dispute exists when an American Federation of Labor Carpenters' Union has a controversy with a butcher employer. Of course, clearly, this goes much farther than it is necessary for the court to go in

order to hold that the present controversy which is between employers and employees in the same industry, is a labor dispute.

It is submitted upon the foregoing that the Circuit Court of Appeals was in error in its construction of the act, and that it should now be held that the present controversy is a labor dispute. In order to hold the contrary, it is necessary to delete from the statute several phrases. It is impossible to understand how it could be held that the present controversy is not a labor dispute, unless the phrase "regardless of whether or not the disputants stand in the proximate relation of employer and employee," is entirely eliminated from the statute. The same is true of that part of Subsection (a) of Sec. 113, which says, "a case shall be held to involve a labor dispute when it involves persons engaged in the same industry, or who have direct or indirect interests therein," and also the phrase "or who are members of the same or affiliated organizations of employers or employees, whether such dispute is between one or more employers or associations, and one or more employees or associations." It is respectfully submitted that the decision that this is not a labor dispute involves the necessary and inevitable logical elimination of this language.

The Norris-LaGuardia Act was the result of a long struggle by organized labor to obtain from Congress further rights and to mitigate the restrictions on its activities in labor struggles. After it was found that the

Clayton Act, passed on October 15, 1914, 38 Stat. 738,

did not accomplish what organized labor had expected, the struggle was continued through the years to get Congress to pass further legislation to give organized labor

the rights which it thought it had obtained in the Clayton Act.

In

American Steel Foundries v. Tri-City Central Trades Council, 257 U. S. 184,

this Court decided that the Clayton Act did not permit workingmen who were neither employees, nor ex-employees, of an employer to picket and carry on the other activities incident to a strike against such employer, without being subject to be enjoined by the Federal Court. It was held in that case that while employees and ex-employees, and members of a labor union of such employees and ex-employees could not be enjoined from peaceful picketing, persuasion, etc. other workingmen even in the same craft or industry could be so enjoined. It was to avoid this effect of this decision that the campaign was carried on to persuade Congress to extend the scope of its labor legislation. This was finally accomplished in the Norris-LaGuardia Act. There can be no question but that the sole purpose of the act was to change the law as it had been laid down in the above case, that is, that at least all those engaged in the same industry or craft could use the usual peaceful remedies of organized labor against an employer, whether they were his employees, or ex-employees, or not. That is really the sole advance, so far as the organized labor is concerned, of the Norris-LaGuardia Act. By the decision of the Circuit Court of Appeals that purpose of the act is set at naught, and by that decision the law remains as it was under the American Steel Foundries case. This means, that the Norris-LaGuardia Act has accomplished nothing, and added no feature to existing law. Certainly, it is clear that this was not the intent of Congress.

Since it was intended by the Norris-LaGuardia Act to change the law as it then existed, it is also clear that it was meant that organized labor could strike, picket and use peaceful persuasion against any employer in the same trade or industry whether any employees or ex-employees of that employer participated in the struggle or not. There can be no doubt for instance that Congress intended that if a Union comprising a great number of employees in a vast number of shoe factories throughout United States saw fit to picket or use peaceful persuasion against all or a number of such factories, this could not be enjoined even though employees in certain factories took no part in the struggle and were not in favor of it. Numerous illustrations of strikes against a large number of plants, united or not united in one organization, have occurred very recently, and it cannot be doubted that Congress intended that labor unions representing workingmen of the craft employed in such plants should have the right to use the peaceful means of the labor struggle against such plants notwithstanding that there was no specific dispute in some of the plants between the particular employer and his specific employees. This right, the decision of the Circuit Court of Appeals takes away. It is submitted that this was clearly not the intent of Congress, and that in so holding the court has misconceived the legislative intent, and that the judgment of the District Court which it affirmed is therefore erroneous, and should be reversed.

There is in the case another basis for a labor dispute besides that of unionization, and that is the question of hours of work. To this the trial court paid no attention at all, and it was not discussed by the Circuit Court of Appeals. E. G. Shinner, President of respondent testified (R. 14, (5551)) that the company does employ some of its em-

ployees more than 48 hours per week, which is the union standard, and was the demand of the contract presented by petitioners to respondent. (See testimony of Archie Russell, Vice-President of respondent, (R. 18, (5551)). And testimony of Petitioner, Edward Lauf, (R. 32, 33 (5551)). Therefore, even if the court was of the opinion that the effort to organize respondents' employees and cause them to join petitioner union, was not sufficient ground to constitute a labor dispute where respondent's employees were not desirous of joining. There was a dispute about terms and conditions of employment upon which the court should have held, that there was a labor dispute irrespective of its opinion on the other question.

II.

The Decision of the Circuit Court of Appeals Is In Conflict With the Decisions of This Court.

The question at issue is no longer an open one in this Court . On May 24, 1937, in the case of

Senn v. Tile Layers Protective Union, Local No. 5, 300 U. S. ——— 81 L. Ed. 829, 57 (16) S.C.R. 857

this Court decided that a labor union could not be enjoined from picketing in a case in which the only question at issue was whether the employer should be permitted to work at the trade himself, and that such picketing could not be enjoined by the court, although none of the employees of the particular employer who was being picketed were members of the labor union which was doing the picketing, and although there was no dispute between the employer and his employees. With reference

to the particular question at issue here, the Court says, in the majority opinion by Justice Brandeis:

> "The unions acted, and had the right to act as they did, to protect the interest of their members against the harmful effect upon them of Senn's action * * * Because his action was harmful *the fact that none of Senn's employees was a union member or sought the union's aid was and is immaterial.*"
>
> "The law of Wisconsin as declared by its highest court permits unions to endeavor to induce an employer when unionizing his shop to agree to refrain from working in his business with his own hands — so to endeavor, *although none of his employees is a member of the union.*"
>
> "Each member of the unions, as well as Senn, has the right to strive to earn his living. Senn seeks to do so through the exercise of his individual skill and planning. The union members seek to do so through combination. Earning a living is dependent upon securing work, and securing work is dependent upon public favor. To win the patronage of the public each may strive by legal means." (Italics ours.)

The decision was rendered with reference to the Wisconsin Labor Code, Secs. 103.51 to 103.63, Wisconsin Statutes, 1935, but the provisions involved are identical with the provisions of the Norris-LaGuardia Act. Thus, the definition of "Labor Dispute," Wisconsin Statutes, Sec. 103.62 (3) is identical with the definition in Sec. 113, Title 29 (c), and the language describing a labor dispute, Statutes of Wisconsin, Sec. 103.62 (1) (2), is identical with Sec. 113, Title 29 (a) (b). Therefore, the decision of this court is a decision as to the question involved under the Norris-LaGuardia Act.

It follows that what was sustained under the Wisconsin Labor Code as peaceful and legal conduct, must likewise

be sustained under the Norris-LaGuardia Act, the parallel Federal Statute.

The facts in the Senn case go much farther than the facts in the instant case, and require an interpretation of the provisions of the Labor Code much broader than is contended for by petitioners. The Senn case extended the doctrine of

> *American Furniture Co. v. I. B. of T. C. & H. of A.*, 222 Wis. 338, 268 N. W. 250.

The facts in the latter case were exactly parallel to the facts in the present case, that is, the union was striving to unionize plaintiff's shop in spite of the fact that none of his employees were members of the union. In the Senn case, the union not only insisted on unionizing Senn's shop, although his men were not members of the union, but demanded that he himself cease working with the tools of his trade. Upon these facts this Court held that the union had the right to picket and use all means of peaceful persuasion to bring about the desired result. It is, therefore, submitted that there can be no question but that the law is settled in this Court that appellant union has the right to picket in a case such as the present. Therefore, the decision of the Circuit Court of Appeals is not in accord with the law as laid down by this Court.

It is submitted that even the dissenting Justices of this Court in the Senn case clearly recognize the right of a union to picket under circumstances such as exist in the present case. The dissenting opinion says:

> "It may be assumed that the picketing, upheld in virtue of the challenged statute, lawfully might be employed in a controversy between employer and employees for the purpose of persuading the employ-

er to increase pay, etc., and dissuading non-union workers from displacing union members. The right of workers, parties to a labor dispute, to strike and picket peacefully to better their condition does not infringe any right of the employer."

And on page 6, Justice Butler says:

"The contest is not between unionized and other contractors, or between one employer and another. The immediate issue is between the unions and plaintiff in respect of his right to work in the performance of his own jobs. * * * Between union members and plaintiff there is no immediate or direct competition. * * * The interest of the unions in the manual labor done by the plaintiff is so remote, indirect and minute, that they have no standing as competitors. Under the circumstances disclosed here, the conduct of the unions was arbitrary and oppressive."

It is clear from Justice Butler's opinion that the dissent is based solely on the fact that the defendant union was not in competition with the employer who sought to work at the trade himself, and that for this reason only the picketing was unlawful. It follows that if the union had been picketing because it was in competition with the employees of the employer whom it was picketing, the picketing would be lawful. Here, the appellant union is composed of butcher workmen in competition with the butcher workmen employees of respondent, and consequently the picketing is lawful, even within the reservations of the dissenting opinion in the Senn case.

The decision of the Circuit Court of Appeals was likewise out of accord with the decisions of this court in

Virginia Railway Co. v. System Federation No. 40, 81 L. Ed. 470, 299 U. S. 529.

National Labor Relations Act Cases, 300 U. S. ———, 81 L. Ed. 563, 585, 603, 108 A.L.R. 1352.

III.

The Decision of the Circuit Court of Appeals is Contrary to the Labor Code of Wisconsin, And Its Interpretation by the Supreme Court of Wisconsin.

As has been stated, the decision of the Circuit Court of Appeals holds that the object to be attained by petitioners' picketing is unlawful, and that, therefore, the act of picketing is unlawful.

Sec. 103.53, Statutes of Wisconsin, 1935, provides, somewhat differently than the parallel provision of the Norris-LaGuardia Act, that the specific acts enumerated, whether performed singly or in concert, shall be legal. The enumerated acts include, giving publicity to, or communicating information regarding the existence of or the facts involved in any dispute, whether by advertising, speaking; patrolling any public street or any place where any person or persons may lawfully be; assembling peaceably to do any of the acts specified; advising or notifying any person or persons of an intention to do any of the acts specified; advising, urging or inducing others to do the act specified; peaceful picketing or patrolling, whether engaged in singly or in numbers. The parallel section of the Norris-LaGuardia Act, Sec. 104, Title 29, U.S.C. does not provide in the same language that such acts are legal, but takes away the jurisdiction to issue injunctions against them, nor does it contain the extra and specific provision contained in 103.53 Wisconsin Statutes (1) as follows:

> "Peaceful picketing or patrolling, whether engaged in singly or in numbers, shall be legal."

It is clear from the foregoing quotation of the language of the Statutes of Wisconsin that the legislature has made

the acts here enjoined legal acts if they were not so before the enactment of the statute. This court held in

Senn v. Tile Layers Protective Union, supra,

under Point Second, that by virtue of the statute such acts were legal. The court says, under Point Third,

> "That the members of a labor union might, without special statutory authorization by a state make known the facts of a labor dispute for freedom of speech is guaranteed by the federal constitution."

It is submitted that in view of this provision of the statute of Wisconsin, the decision of the Circuit Court of Appeals to the effect that the means here employed, that is, the picketing and persuasion, were unlawful, is clearly erroneous.

In

American Furniture Co. v. I. B. of T. C. & H. A. Local No. 200, 222 Wis. 338, 268 N. W. 250,

the Supreme Court of Wisconsin decided a case involving exactly the same situation as exists in the present case. In that case none of the employees of the plaintiff were members of the defendant union which picketed plaintiff's place of business, and the employees had all voted on two separate occasions unanimously that they did not want to join the union and were satisfied with their conditions of employment. There was absolutely no dispute therefore between the employer and his own employees. The question as to whether under these circumstances there was a labor dispute within the meaning of the Wisconsin Labor Code, and the Norris-LaGuardia Act, was the principal issue in the case. The court says (222 Wis. 347):

> "Upon these facts, the question is squarely presented whether there was a labor dispute involving

plaintiff and defendants in view of the fact, (1) that no employee of plaintiff was a member of defendant unions; (2) that none desired or was willing to become a member; (3) that the employees were wholly satisfied with the conditions of their employment; (4) that the employees opposed the execution of the contracts proposed for plaintiff's execution; (5) that plaintiff has been unwilling to coerce its employees to join the unions, and has throughout been willing to take such position in that respect as its employees desired."

Upon this state of facts, the court decided, after careful analysis of the statutes and their historical background that there was clearly a labor dispute and refused to enjoin the union from picketing and peaceful persuasion. The court shows that the acts sought to be enjoined are legalized by the statute, and that the jurisdiction of the courts to proceed by equitable relief, was clearly intended to be taken away.

The decision is squarely contrary to the decision of the Circuit Court of Appeals in the instant case.

The question raised by the Circuit Court of Appeals in its decision in this case that the demand of the union upon the employer to recognize it as the bargaining agent of his employees, although his employees were not members of that union and did not designate it as a bargaining agent, is coercion in violation of the preamble of the Norris-LaGuardia Act and the Wisconsin Labor Code, was answered by the court in the negative (American Furniture case, supra, 367, et seq.)

The court there shows that the preamble of both acts provides only that the worker shall be free from interference and coercion *by the employer*, and that neither act

contained any provision, either in the body of the act, nor in the preamble, prohibiting such interference or indirect coercion as may result from the activity and efforts of a labor union in the exercise of its rights of persuasion and effort at organization to get all employees into the union. It is clear that neither Congress nor the legislature of Wisconsin intended that there should be any prohibition on the labor unions in exercising to the fullest extent their efforts to obtain 100% organization.

The language of the preamble of both acts is identical with reference to this matter, and is as follows:

> "The individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows. It is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. * * *"

It will be noted that the language of both preambles is "free from the interference, restraint or coercion of *employers of labor, or their agents.*"

If Congress and the legislature of Wisconsin had intended to prohibit the incidental effect in forcing certain employees who do not wish to join organizations into such organizations, it would have said so, or at least would not have used the definite and clear language restricting

only coercion by employers. This is the old argument against the strike for a closed shop. It has been repeatedly urged that the strike for a closed shop forces those employees who do not wish to join any organization, either to join the organization or quit their employment. Nevertheless, the question of the right to strike for, and agitate for, the closed shop is no longer an open one.

The Circuit Court of Appeals says, that it is the declared public policy of both the Nation and the State of Wisconsin to protect the substantive right of employees not to be coerced to join any organization, and that such right will be protected by injunction even though no specific provision therefor be contained in either the Wisconsin Labor Code or the federal legislation. This statement is exactly the contrary of the true situation today if it be applied, as the Circuit Court of Appeals applies it, to such pressure as results from labor's own efforts to organize. It is the declared public policy, both of the United States and of the State of Wisconsin, that economic peace can only be obtained by fostering and aiding organizations of laboring men and permitting them the utmost freedom in their attempt to organize all workingmen. This is clearly expressed in the legislation. It is the background of much other modern labor legislation, and it is the public policy expressed by this court. It has become the settled doctrine that this country can not get out of its industrial turmoil and achieve conditions of industrial peace and that good order cannot be restored except by fostering labor organizations and treating with workingmen in organizations. Therefore, it is a beneficent exercise of the police power of the Government to aid labor organizations and assist them in their efforts to get all workingmen into such organizations.

"Discrimination and coercion to prevent the free exercise of the right of employees to self-organization and representation is a proper subject for condemnation by competent legislative authority. Long ago we stated the reason for labor organizations. We said that they were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment; that union was essential to give laborers opportunity to deal on an equality with their employer. *American Steel Foundries v. Tri-City Central Trades Council,* 257 U. S. 184, 209. We reiterated these views when we had under consideration the Railway Labor Act of 1926. Fully recognizing the legality of collective action on the part of employees in order to safeguard their proper interests, we said that Congress was not required to ignore this right but could safeguard it. Congress could seek to make appropriate collective action of employees an instrument of peace rather than of strife. We said that such collective action would be a mockery if representation were made futile by interference with freedom of choice."

National Labor Relations Board v. Jones & Laughlin Steel Corporation, 81 L. Ed. 573.

It has been recognized that employees are entitled to organize for the purpose of securing the redress of grievances and to promote agreements with employers relating to rates of pay and conditions of work. *American Steel Foundries v. Tri-City Central Trades Council,* 257 U. S. 184, 209. Congress was not required to ignore this right of the employees but could safeguard it and seek to make their appropriate collective action an instrument of peace rather than of strife.

Texas & N. O. R. Co. v. Ry. Clerks, 281 U. S. 548, 570.

"In dealing with the relation of employer and employed, the legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression."

West Coast Hotel Co. v. Parrish, 300 U. S. 379, 393.

It is clear, therefore, that statement of public policy by the Circuit Court of Appeals is erroneous.

Following the case of *American Furniture Co. v. I. B. of T. C. & H.,* supra, the Supreme Court of Wisconsin decided the case of

Senn v. Tile Layers Protective Union, Local No. 5, 222 Wis. 383, 268 N. W. 270,

and extended the doctrine of the American Furniture case by holding that a labor dispute existed, notwithstanding that all employees of the employer were satisfied, and did not wish to join the union, and that there was no dispute between the employer and his employees, and that it was sufficient ground to constitute a labor dispute that the union demanded that the employer cease to work with the tools of his trade.

It is clear, therefore, that the decision of the Circuit Court of Appeals is contrary to the law of Wisconsin, and that, therefore, it is erroneous. Irrespective of what the Circuit Court of Appeals held as to the Norris-LaGuardia Act, its decision as to the Wisconsin Labor Code is erroneous, and this in itself is ground for its reversal.

Petitioner and respondent were bound by the law of Wisconsin, and it was the duty of the Federal Court in Wisconsin to act in accordance with that law.

IV.

The Decision of the Circuit Court of Appeals is Against the Weight of Authority.

Much change has taken place in the decisions of the courts in recent years with reference to the rights of organized labor and collective bargaining. Much that was said by the courts a few years ago is not law today on this subject.

In the appendix to respondent's brief (No. 658 Oct. 1936 term) in this Court in *Senn v. Tile Layers Protective Union, Local No. 5,* supra, are listed 17 states which have passed labor codes of laws similar to the Norris-LaGuardia Act. Since that list was made Maryland passed such an Act (Md. Laws 1935 c. 574) and Pennsylvania passed a new act June 2, 1937.

The doctrine is quite well established by the decided cases today whether under the legislation referred to, or without it, that organizations of labor have the right to strike for a closed shop, or to picket peacefully without declaring a strike, and to use every means of peaceful persuasion to attempt to increase their organization, to persuade workingmen to join such organization and to dissuade the public from dealing with an employer who refuses to deal with a labor organization. It is also settled that this right to use peaceful persuasion extends at least to all those engaged in the same industry irrespective of the fact whether employees of the particular employer

have a dispute with him or not. Picketing and persuasion by labor unions for the purpose of unionizing a particular industrial establishment, is legal.

> "The purpose of a labor union to improve the conditions under which its members do their work, to increase their wages, to assist them in other ways, may justify what would otherwise be a wrong. So would an effort to increase its numbers and to unionize as entire trade or business. * * * Economic organization today is not based on the single shop. Unions believe that wages may be increased, collective bargaining maintained, only if union conditions prevail, not in some single factory, but generally. That they may prevail, it may call a strike and picket the premises of an employer with the intent of inducing him to employ only union labor. And it may adopt either method separately. Picketing without a strike is no more unlawful than a strike without picketing. Both are based upon a lawful purpose. Resulting injury is incidental and must be endured."

Exchange Bakery & Restaurant v. Rifkin, 245 N. Y. 260.

> "The modern view is that picketing is not per se unlawful, and should not be enjoined, if peaceably carried on for a lawful purpose."

Bayonne Textile Corporation v. American Federation of Silk Workers et al., 116 N. J. Eq. 146, 176 A. 551.

Steffes v. Motion Picture Operators' Union, 136 Minn. 200, 161 N.W. 524.

Kirmse v. Adler, 311 Pa. 78, 166 Atl. 566.

United Chain Theatres Company v. Philadelphia M. P. M. O. Union (Pa.), 50 Fed. (2d) 189.

S. A. Clark L. Co. v. Cleveland W. & D. Local No. 106 (Ohio) 154 N.E. 362.

Blumauer v. Local No. 159, 141 Ore. 399, 17 Pac. (2) 1115.

Cinderella Theater Co. v. Sign Writers' Local Union (D. C. Mich.), 6 F. Supp. 164.

Fenske Bros. v. Upholsterers International Union of North America, 358 Ill. 239, 193 N.E. 112.

Dean v. Mayo (La.), 8 Fed. Supp. 73.

Miller Parlor Furniture Company v. Furniture W. I. Union (N. J.), 8 Fed. Supp. 209.

Many other cases could be cited but the foregoing are fairly illustrative of the trend of modern authorities.

It will be urged by respondent that the District Court has found in its findings of fact that petitioners have gone beyond peaceful conduct. It is true that the findings of fact contain conventional accumulation of words usually included by counsel in findings of fact in cases of this kind. Thus the court finds (R. 7, (6172)-) that for the purpose of coercing complainant to require its employees to join the union, and for the purpose of injuring and destroying the business of complainant, defendants have conspired to cause and have caused false and misleading signs and placards to be placed before the markets of the complainant, and have falsely accused the complainant of being unfair to organized labor, and have prevented patrons of complainant from patronizing said markets by molestation, annoyance, threats and intimidation. The evidence, which is very brief, shows that the acts of the petitioners consisted in carrying the usual signs stating their opinion that respondent was unfair to organized labor, and that the persuasion consisted in attempting to induce the public not to deal with

respondent. There was no violence, no breaches of the peace and no necessity for the interference of peace officers. The activities were the usual ones incident to a strike or picketing.

But even though the findings of the District Court be taken as a verity and though the words used therein be taken in their broadest scope, it is submitted that the judgment of the District Court, and the injunction issued upon the same, were erroneous in law.

The judgment (R. 9, (6172)-) provides that a writ of permanent injunction issued restraining the defendants "from in any wise picketing," and "from advertising, stating or pretending that the said complainant, E. G. Shinner & Company is any wise unfair to said defendant, or organized labor generally, and from annoying, molesting or persuading or soliciting any customers or prospective customers to cease patronizing the complainant." The permanent injunction (R. 10, (6172)-) is in the same terms. Whether or not there had been acts on the part of petitioners which transgressed their rights, or the rights of organized labor, the judgment and injunction in these terms, is not warranted by the law.

> "Here, however, the excess has been noise and shouting whereby customers were frightened and crowds collected. We have never gone so far as to hold that wherever acts or words went beyond peaceful picketing, all picketing was to be enjoined."
>
> *Wise Shoe Co., Inc. v. Retail Shoe Salesmen's Union*, 266 N. Y. 264.

The same situation prevailed in—

> *Bayonne Textile Corporation v. American Federation of Silk Workers, et al.*, 116 N. J. Eq. 146, 176 A. 551.

in which the Appellate Court held that an injunction of the scope of this was not legally permitted.

It is submitted that there is nothing in the evidence of this case distinguishing it from the usual case of a labor dispute, with its concomitants of noise, excitement and some boisterousness, and that there was no basis for the general language contained in the findings. But, whether this be true or not, there was no basis in law for the prohibition against all picketing and peaceful persuasion. Therefore, the decision of the Circuit Court of Appeals in sustaining the judgment of the District Court was erroneous.

The Circuit Court of Appeals also endeavors to sustain its position, and it will no doubt be argued here by respondent, that there is a controversy here between two unions, and that the employer is not interested in this fight. This is not a fact. The attempt to put up the so called rival union as against petitioner union is the usual transparent subterfuge of the employer to divert attention from himself and seek to focus it on a straw man of his own creation.

There is no finding of fact by the trial court as to any controversy with any alleged union of the employees of the respondent. Clearly, therefore, the trial court was convinced that there was no contest between any rival union. The findings of fact both upon the granting of the temporary injunction (R. 38, (5551)-) and upon the trial (R. 6, (6672)-) definitely settled the fact that this is a contest between an employer and employee.

The respondent did try to divert attention by establishing the existence of a union amongst its own employees. That this so called union was the conventional and notor-

ious employers' own union at which the provisions of the Wagner Labor Relations Act are aimed is clear beyond question from the evidence. When the employer became aware that a labor controversy was about to be started by petitioner union to improve conditions in respondent's place of its business, and to demand the recognition of the union, it started the usual tactics of endeavoring to create a union in its own place, and this it did, as it is always done in these cases, by attempting to produce the initiative through some of its employees. Mr. Russell, the Vice-President of respondent, would not say that the union was not a countermove against the A.F.L. Union, but immediately came forward with the statement that it was formed on the request of the "boys", meaning his employees (R. 17, (5551)-). At the request of the employees, he says that he helped them start it and that the company helped form the company union, and of course, the company union, as is always the case in these controversies became a 100% union, that is, every employee of respondent belonged to it. (See testimony of Sokolowski, R. 23 (5551)-), who also describes how the union was formed at luncheons with the help of Vice-President Russell and a Mr. Anderson who was brought from Chicago by the company for the specific purpose of forming the union and providing it with constitution and by-laws. The men did not know who he was (R. 24, (5551)-) but it was afterwards stipulated by counsel for respondent that he is the secretary and auditor of the company (R. 31, (5551)-). It is clear, therefore, that this so called union is a company union and a mere sham created to fool the men and to hamper real labor organizations. Nor were the men, who suddenly became so anxious to have a labor organization, informed that a few days before the company had received the demand of the petitioner,

A.F.L. Union that it sign a union agreement. (R. 25, (5551)-), and it is quite evident that all employees knew that, in spite of the profession by respondent of the freedom of choice of labor organizations accorded the employees, that they had to belong to the company union (R. 35, (5551) testimony of Heller) to hold their jobs.

It is clear, therefore, that there is no basis for the statement of the Circuit Court of Appeals that this is a controversy between two unions. It is a labor controversy against an employer who has created for his own purposes an agency to help him defeat organized labor, that is, the company union. It is clear also that there is no analogy between this case and *United Electric Coal Co. v. Rice,* 80 Fed. (2nd) 1, in which case there were really and in truth two rival labor organizations not formed by the employer, or through his intervention, but the voluntary creation of workmen. It is, therefore, submitted that the statement by the Circuit Court of Appeals as to the existence of a dispute between rival unions in this case is not warranted by the facts and gives no support to its decision.

V.

CONCLUSION

It has been shown that the decision of the Circuit Court of Appeals strikes out from the Norris-LaGuardia Act essential provisions thereof and that by this means the entire purpose of the act is frustrated, and the intent of Congress to add to the rights of labor by this legislation, is nullified. It has also been shown that the same is true of the Wisconsin Labor Code, and that if the decision of the Circuit Court of Appeals stands as the law, this legis-

lation is ineffective and organized labor is reduced to a condition in which it found itself before this legislation was passed. It has been shown further that under the decision of the Circuit Court of Appeals the rights of labor are decreased to a point even beyond that which existed prior to the passage of the Norris-LaGuardia Act and similar legislation in many of the states of the United States. It has been shown further that the decision is contrary to the doctrine of this court, especially as announced in the Senn case. And it has been shown that the decision of the Circuit Court of Appeals is contrary to the prevailing doctrine of the courts of the country.

It is, therefore, respectfully submitted that the writ of certiorari should be granted as prayed for, and the decision of the Circuit Court of Appeals should be reviewed.

Respectfully submitted,

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